Supreme Court, U.S.
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No. 03-1311

In The

Supreme Court of the United States

RICARDO ANTONIO DUENAS
AND LUZ MARIA DUENAS,

Petitioners,

v.

MILES Q. MONTEGUT AND MONICA MONTEGUT,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Texas

REPLY TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction when Petitioners never raised the Constitutional due process issue at trial and presented it for the first time in the Texas appellate Courts (Ricardo) and this Court (Luz)?

2. Did Petitioners waive the Constitutional claim by failing to raise it at trial?

3. Even if not waived, did the trial establish that the 14th Amendment's due process minima was satisfied?

PARTIES

Petitioners identify only some the parties involved, ironically omitting (i) the children ("L.M.I. & J.A.I.") and (ii) the Court-appointed guardian/attorney ad litem (Hon. Christine Mangle). App. 1, 120.

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CHALLENGE TO JURISDICTION

Globally referring to 28 U.S.C. §1257(a) in their Statement of Jurisdiction, Petitioners ignore the dictates of Rule 14.1(h) requiring that they

> "shall . . . specify the stage of the proceedings . . . in the (trial) Court . . . and in the appellate Courts at which the federal questions . . . were raised . . . (,) with specific references to . . . the record as will show that the federal question was timely and properly raised so as to give this Court jurisdiction. . . . "

cf.: "Statement of the Case" (omitting any reference as to when the due process issue at bar was raised).

There is a coy reason for the omission – neither Petitioner "timely and properly raised" the due process issue they present to this Court: *Ricardo* first raised his due process complaint in his Brief at the Texas Court of Appeals – and never presented it at trial (App. 3: "Constituional issue . . . was not preserved," App. 6-7: detailing same), and *Maria* raises her due process argument for the first time in this Court – and never presented it earlier to either the Texas trial or appellate Courts. App. 3 (noting only issue Maria raised was whether "her relinquishment Affidavit was procured by fraud or undue influence"), App. 8-9 (detailing same).

Petitioners failed to "timely and properly raise[]" the only issue they present to this Court. It is waived and this Court is without jurisdiction to consider it. *Webb v. Webb*, 451 U.S. 493, 496-7 (1981); *Lehr v. Robinson*, 463 U.S. 248, 261 (1983); Rule 14.1(h).

FACTUAL SUMMARY

The Children: The children (male twins born on 4/9/99) were born prematurely, considered "high risk" infants and had special needs including heart monitors, extra heat and oxygen treatments. 2 R/R 27, 65, 72-3, 150. By the time they were 6 months old, they had been the subject of two C.P.S. investigations ("medical neglect" and "negligent supervision": *Id.* at 149-50) and one ambulance transport to the hospital due to a heart problem Maria had ignored. *Id.* at 72-4. Maria's own mother aptly declared that she was "neglecting" the children. *Px. 3*, 3 R/R 7, 10.

Maria: She was a troubled young girl admittedly "in trouble with the law." *Pet.*, p.3. Indeed, by the time she was 14 years old, she was dancing naked at a local strip club – even when she knew she was pregnant with the children here (2 R/R 67-8), having sex with older men in Houston (3 R/R 103-5, 113), on probation (2 R/R 83), and in trouble with the school authorities for refusing to go to school (2 R/R 84), *and* suffering from "insecur(ities) and mental problems" due to a poor home environment and upbringing (according to her Mother). *Px. 2*.

Her two best friends (according to her Mother) were a drug dealer and a thief (*Px. 3*), and she was back "out running the streets" by the Sunday night after she gave birth to the children on Friday. 3 R/R 114-8. Maria was (per her Mother and older sister Esther) "not mature enough to take care of (the children)" (*Px. 3*), had "not bonded too well" with them even by the time they were "6 months" old (*Id.*), and refused to "get up every night" for "feedings and diaper changing." *Id.* She slept until "noon" even when the children were 6 months old (2 R/R 41), and pawned off their care to her Mother – who admittedly was

the children's primary caretaker. *Px. 3*; 3 R/R 8; 2 R/R 121-2. Her Mother, at the Affidavit signing ceremony, declared "she couldn't do it anymore." 3 R/R 88.

Determined to divest herself of the children, Maria planned to give legal custody of the twins to her Mother (2 R/R 114, 121), who was actually suing her for "sole" custody. C/R 2. She also regularly discussed giving the children away (3 R/R 5-7; 2 R/R 143, 122) and said that giving the children up was in their "best interest." *Px. 2*; C/R 73; 3 R/R 10 (her sister confirming Maria said it); 2 R/R 64 (Maria admitting she said it). This view was shared by her own Mother (*Px. 3*; 3 R/R 7, 10), older sister and the twins' attorney ad-litem (C/R 97: unchallenged Findings 22-3; 3 R/R 122-3); Maria also reiterated it at the signing ceremony. 2 R/R 64; 3 R/R 88-9. That termination of the parent/child relationship was in the children's "best interest" was not challenged on appeal in either the Texas Courts or in this Court.

Ricardo: When he impregnated 14 year old Maria, Ricardo was a 24 year old foreign national from Honduras in the U.S. on a five-year work permit. 2 R/R 15, 27. He was employed in the U.S. business environment as one of four cooks at a major resort hotel and restaurant in Galveston, and made good money, taking home about $2,800 per month. 2 R/R 21-3. However, he gave little to Maria and the twins, prompting her to write him a "forget me not" card complaining

> "we may not get to see alot of each other [but] where is the money, pinché (asshole)"; "you're there doing nothing for us." *Px. 1*; 2 R/R 78-9.

Since she was a minor child herself, her Mother actually sued Ricardo for "regular" child support. *Id.* at 134. Ricardo,

on the other hand, claimed he provided "everything" for the children (*Id.* at 20) and gave Maria $600-700 a month (*Id.*), but produced no cancelled checks, cash receipts or money order confirmations.

Maria also indicated he had a drug problem, and said he was a "crackhead" at the signing ceremony. 3 R/R 91-2. She described him as a "shitty ass" father who "don't care," "don't give a shit [and] don't even buy diapers," and declared "he didn't help" at all. 3 R/R 87, 46; *Px. 1.* When she discussed giving the twins up with him on the way to the signing ceremony (2 R/R 49) he was not concerned (*Id.* at 31-2) – he was focused on a sexual, live-in relationship with another woman in Galveston (*Px. 2*; 2 R/R 38) *and* he already had a wife waiting for him in Honduras. *Px. 3.* Maria's Mother declared he shouldered no responsibility for the twins (*Px. 2*) and that "(he) can't be a father because, besides the wife he has in Honduras, he has to tend to the woman who is shacking up with him right now." *Id.* Three work days before trial, Ricardo finally formally claimed he was their father (C/R 54) – the twins were nearing 8 months old by then. He married then-16 year old Maria (*Rx. A-2*), – one work day before trial – despite evidence that he already had a wife in Honduras. *Px. 2.*

The evidence at trial showed that the attorney explained the Affidavit of Relinquishment to him in detail and three witnesses at the signing ceremony testified he understood it and repeatedly indicated he understood (3 R/R 18, 13-16, 26-7, 40-2, 45-6, 47-8, 56-7, 70, 86-7, 89-90, 98), that he spoke and understood English and actually did so during the ceremony and immediately afterwards (3 R/R 42, 15, 34, 36), and that (out of abudance of caution) the substance of the document was translated for him into

Spanish by Maria's Mother and Maria herself (3 R/R 45-6, 47-8, 56-7, 70, 86-7, 89-90, 98): that by signing it,

> "he was giving up his rights as a father," that "he wasn't going to be the father anymore (and) he's giving up his rights," that "he was giving up his rights to the children and he will no longer be responsible for them (and) once this is all through, that's it."

3 R/R 86, 94, 97-8. Ricardo was being told "the correct things" in Spanish as the attorney spoke them in English. *Id.* at 70, 86. That he was comfortable with English was exemplified by his showing up for trial with an attorney, but without an interpreter or even a pre-trial request for one. 11/22/99 Hrg. R/R 9.

The Agreement: Maria described her mental attitude at the signing ceremony as "bossy." 2 R/R 59, 82. She decided she wanted periodic photos and updates on the children. 3 R/R 18-19. She was "adamant" about it (3 R/R 71) and the Monteguts (through their Attorney) agreed to provide it. *Px. 4. cf: App. 110* (Ct. of Appeals Opinion: the Monteguts "agreed to [Maria's] demands" and that it "reflect[ed] her demands").

Pre-birth "Small Kindnesses" by Local Police Officer: While investigating Maria's activities at the strip club, a local police officer came into contact with her. 3 R/R 102. He already knew her due to having arrested other household members in the past. *Id.* She told him she was pregnant (3 R/R 113) and he suggested she needed to take better care of herself, to "stop smoking," to get into a prenatal care program, and cautioned her as a "safety issue" against having sex with older men in Houston. 3 R/R 103-5, 113. As he had done for others and as part of

his job (3 R/R 114), he treated her to some "small kindnesses" during her pregnancy (3 R/R 17: Maria's sister Esther so labeling the officer's conduct) – taking her to "2 or 3" local doctor's appointments and helping her get signed up on the W.I.C. program. 3 R/R 106. Maria and her Mother "spoke highly" of him to others (3 R/R 108), and Maria even admitted at trial that "he was legitimately concerned about (her)." 2 R/R 68. He never suggested she put the twins up for adoption, never offered to "place" them, never threatened her and was not involved in the Affidavit signing ceremony (3 R/R 103, 106-9); he did not know who Ricardo was until just before trial. 3 R/R 107.

The Signing Ceremony: Also present at the signing ceremony were two of the attorney's Spanish-speaking staff members. 3 R/R 40. They and others present confirmed the attorney detailed the Affidavits, gave them to Maria and Ricardo to read, went "step-by-step" over them and asked "repeatedly" if they understood what the Affidavits meant and the effect of signing them, and that "if they didn't want to go through with it they didn't have to." *Id.* at 13-14, 16, 18, 40-1, 43, 82-3. Both Maria and Ricardo repeatedly said they understood. *Id.* at 13-15, 18, 21, 26-7, 40-2, 45-6, 56-70, 86-7, 89-90, 98. There were no threats of any type – not even a "hint" of it – either in English or in Spanish. 3 R/R at 82-3, 90, 96, 57. There was no indication of any "influence," "outside force," or that Maria or Ricardo were being "forced" to do anything. *Id.* at 57, 90. No objections were lodged by Maria, Ricardo, Maria's Mother, or by anyone else. 2 R/R 118, 125-6; 3 R/R 10, 88. At least three witnesses testified that from their "observations" Maria and Ricardo understood and signed "voluntarily." *Id.*, at 56-7, 89, 13-15. Immediately after the ceremony, Esther directed a congratulatory comment in

English to Ricardo and praised him for his "courage," asking her Mother to translate it in Spanish for him (*Id.* at 34-6); Ricardo indicated translation was not necessary since he understood Esther's comment. *Id.*

The Affidavits: Both Maria and Ricardo executed Irrevocable Affidavits of Relinquishment on 9/24/99. C/R 66, 73. They sponsored them at trial and had them admitted into evidence without objection or limitation. 2 R/R 11-13, 105; *Rx. A-1*; *Rx. B-1*. The Affidavits (in due and proper form) confirmed *inter alia* that Maria and Ricardo had been "informed" of their "parental rights, duties and privileges" (*Id.*) and they "freely and voluntarily . . . relinquish (the children) . . . " (C/R 67, 74), they "fully understand the meaning of (the) Affidavit(s) and the finality of (their) action in signing (them), and . . . (they were) signing freely and voluntarily with the firm conviction that this decision is the best alternative for (the) children" (*Id.* at 69-70, 76), and that there was no thought in (their) mind(s) that (they) might someday seek to change (their) mind(s)" (*Id.* at 70, 77) and that they were not impaired "because of illness, medication, (their) emotional state or any other reason." *Id.* A week or so later, after discussing matters with her friends, Maria changed her mind. C/R 11, 15-16. Ricardo voiced no objection until three work days before trial. C/R 57.

ARGUMENT

Petitioner's complaints were resolved at the trial Court level in a 2 day 'bench trial' which included testimony from 9 witnesses and the admission of 7 exhibits. Nowhere and at no time did either Petitioner raise any

Constitutional question. App. 3-12. This is the only issue Petitioners present at bar. It is waived, as detailed in the Challenge to the Jurisdiction. *See also*, App. 3-12.

Even if not waived, the evidence at trial confirmed that both Petitioners wree treated fairly and within any Constitutional guidelines. For example, there was substantial evidence that Ricardo spoke and understood English, rendering translation of his Affidavit into Spanish unnecessary. App. 3-12. The evidence about Ricardo's English proficiency was "a factual dispute," the trial Court acting as fact finder rejecting Ricardo's evidence as not credible. Out of abundance of caution, Richard's Affidavit was translated into Spanish for him, as noted in the factual statement. He was beging told "the correct things" in Spanish about the Affidavit of relinquishment as the attorney spoke them in English.

As to Maria, she complains here (for the first time) of the detective's "undue influence" which in her new view now amounts to a Constitutional violation. Ironically, the conduct she compains of occurred almost a year before she executed the Affidavit of Relinquishment! Moreover, she confessed from the witness stand at trial that the detective "was legitimately concerned about (her)" and both she and her Mother "spoke highly" of him to others. Indeed, the conduct Maria complains about was aptly described as mere "small kindnesses" by Maria's own sister.

CONCLUSION

This Court is without jurisdiction to consider Petitioners' due process arguments. Indeed, they waived the only issue presented at bar. Neither presented the alleged due

process violation at trial, not by pleadings, evidence or argument. Ricardo first raised his due process argument in the Texas Appellate Courts; Maria presents hers for the very first time at bar. Even if this Court were to hold the due process issue was not waived, the Texas Supreme Court decision was nevertheless correct. There was, after all, substantial evidence that Ricardo actually understood English and fully understood the effect of signing the relinquishment Affidavit. The bench trial before a proper Judge, where Petitioners (i) were represented by counsel of their own choosing, and (ii) were able to present all their arguments and evidence against termination, fully satisfied any due process concern. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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